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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934	)	WT Docket No. 97-192

To: The Commission

REPLY COMMENTS

BellSouth Corporation ("BellSouth"), on behalf of its subsidiaries and affiliates, hereby submits this Reply to comments filed in response to the above-captioned Notice of Proposed Rulemaking ("*NPRM*") released on August 25, 1997.[1]

The positions taken in BellSouth's Comments were based on the clear language of the relevant statutory provisions and legislative history, as well as the reasonableness of the Commission's proposals. Thus, not surprisingly, BellSouth's comments received the support of many other parties, as indicated below. However, BellSouth disagrees with certain other commenters who seek to limit the Commission's clear jurisdiction with respect to RF emissions. Further, comments suggesting that the RF emissions rules adopted by the Commission are not entirely adequate to ensure that the potential for RF exposure is sufficiently minimized are unfounded.

I. Final Action Is Not a Prerequisite for Petitioning the Commission for Relief

In its Comments, BellSouth pointed out that based on the plain language of Section 332(c)(7)(B)(v), a party adversely affected by any act or failure to act by a state or local

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[1] FCC 97-303, 62 Fed. Reg. 47,960 (1997).

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government that is inconsistent with the prohibition of such action on the regulation of personal wireless service facilities on the basis of the environmental effects of RF emissions may petition the Commission for relief.[2]

Contrary to the opinions of certain commenters, the term "final action" is relevant only to seeking court review of actions covered under § 332(c)(7)(B). All arguments to the contrary are erroneously premised on the fact that "final action" is required for purposes of seeking relief at the Commission under clause (iv) of this section, in direct contravention to the exact words used in statute.[3] Congress chose its words carefully in making this distinction, and should be accorded the deference so deserved.[4]

II. Determinations of "Failure to Act" Must Be Made on a Case-By-Case Basis

With respect to determinations of a "failure to act" by a state or local government, BellSouth agreed with the Commission that a case-by-case approach is most suitable given the variety of timeframes encountered among different jurisdictions.[5] Because such timeframes may also vary depending on the degree of complexity and controversy of the particular issues involved, BellSouth also stated that an average time for determining a failure to act would be

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[2] BellSouth Comments at 2. *Accord*, GTE Comments at 2-3, PCIA Comments at 5-6, PrimeCo Comments at 10-12, Southwestern Bell Comments at 2-3, US WEST Comments at 18-19.

[3] *See, e.g.*, Concerned Communities and Organizations ("CCO") Comments at 31-35, National League of Cities ("NLC") Comments at 8-9, San Francisco Comments at 2-3, Seattle Comments at 1-2.

[4] *See, e.g., Florida Pub. Telecomm. Ass'n v. FCC*, 54 F.3d 857, 860 (D.C. Cir. 1995).

[5] BellSouth Comments at 2-3. *Accord*, CTIA Comments at 4, PrimeCo Comments at 12, San Francisco Comments at 3, Southwestern Bell Comments at 4, Vermont Environmental Board ("VEB") Comments at 9.

difficult to determine.[6] Indeed, the fact that a wide range of timeframes has been suggested by those commenters who offered specific timetables only illustrates this point.[7] Thus, BellSouth believes that the most workable approach for determining a failure to act would be to have the Commission take into account the various factors it proposed such as how state and local governments typically process other facility siting requests and other RF-related actions.

In its Comments, the National League of Cities ("NLC") argues that under Section 332(c)(7)(B)(ii), the Commission has no jurisdiction and thus no authority to make any binding interpretation of the meaning of the phrase "reasonable period of time" in that provision.[8] However, this argument is irrelevant, since it is the "failure to act" under § 332(c)(7)(B)(v) that the statute commands be the basis for allowing parties to seek relief at the Commission. While BellSouth agrees with the NLC that an "average" time may be unworkable, certainly the Commission can (and must, under its statutory obligation) decide on a case-by-case basis, considering factors such as timeframes involved with similar local government actions, when a state or local government authority is merely stonewalling and essentially violating § 332(c)(7)(B)(iv).

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6 BellSouth Comments at 3.

7 *See* Bozeman City-County Comments at 1 (8 weeks), CCO Comments at 31 (minimum of 45 days), CTIA Comments at 5 (90 days), GTE Comments at 3-4 (6 months), Orange County Comments at App. (18 weeks for variance and building permit approvals), Sprint Comments at 6 (120 days after submission of application).

8 NLC Comments at 9.

III. State and Local Actions Need Not Be Directly Based on the Environmental Effects of RF Emissions in Order to Be Preempted

Citing clear Congressional intent, BellSouth also supported the Commission's proposal that state and local regulations need not be based entirely on the environmental effects of RF emissions in order for decisions to be reviewed by the Commission.[9] The legislative history clearly supports the notion that state and local governmental actions based both directly and indirectly on the environmental effects of RF radiation may be preempted by the Commission.[10]

The NLC commented that parties seeking relief at the Commission should be limited to challenging only those state or local governmental actions that are based entirely on RF emissions.[11] As an initial matter, this position is contradictory to the rights conveyed to parties adversely affected by local actions based on RF emissions. Simply stated, § 332(c)(7)(B)(v) provides an unrestricted option to petition the FCC for relief under such circumstances. If the NLC position were adopted, state and local governments would be able to simply add a non-RF related issue in order to avoid FCC review of a decision motivated by RF emissions concerns. The Commission has the relevant expertise and is thus best suited for resolving issues relating to the newly developed and intricate RF emissions rules.

In the *NPRM*, the Commission sought comment on whether it could grant relief from local decisions based on RF concerns in cases where no formal justification is provided for the decision, if there is evidence to support the conclusion that concern over RF emissions consti-

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9 BellSouth Comments at 3-4.

10 *Accord*, AT&T Comments at 6, CTIA Comments at 5-6, GTE Comments at 5-6, PCIA Comments at 7-8, PrimeCo Comments at 13-14, Southwestern Bell Comments at 4-5, US WEST Comments at 20-21, VEB Comments at 11; *see* Ameritech Comments at 5, Sprint Comments at 7.

11 NLC Comments at 11-15.

tuted the basis for the regulation.[12] BellSouth supported this proposal.[13] However, a few commenting parties stretch this proposal and claim that Commission review of factors other than those explicitly set forth in the text of the local decision raises concerns under the First Amendment to the U.S. Constitution.[14] These arguments are premised on the erroneous assumption that the Commission would scour testimony and latch on to the first mention of RF issues as a basis for asserting jurisdiction, resulting in a "chilling effect" on public testimony.

As an initial matter, the testimony of any person is made part of the public record, and is as a matter of course indeed reviewable by, for example, zoning boards of appeals. Testimony is also often offered in the presence of others with adverse opinions. Surely these factors do not form the basis for an assertion that such testimony is chilled as a result. In any event, the only action which would be subject to FCC review would be those local decisions based directly or indirectly on remarks relating to RF emissions, not on the remarks themselves.

Of course, the FCC is not proposing to directly or indirectly regulate the content of speech, or the time, place or manner of speech, but rather to simply fulfill its statutory obligation to grant relief if evidence exists that shows concerns over RF emissions constituted the basis for a local regulation, as Congress has mandated. In BellSouth's opinion, the Commission is simply acknowledging that there may be cases where state and local governmental actions which are in fact based on RF concerns are purposely cloaked in order to avoid FCC jurisdiction. If an

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12 *NPRM* at ¶ 140.

13 BellSouth Comments at 3-4.

14 *See, e.g.,* CCO Comments at 8 ("chilling effect on free speech in local public meetings"); Parish of Jefferson Comments at 3 (chilling effect), NLC Comments at 17 (local governments would be put in the position of "gagging" their citizens).

adversely affected party has reason to believe that the local action was based on the environmental effects of RF emissions, relief from the Commission must be available in order to carry out the statutory mandate of § 332(c)(7)(B)(iv). Relief would only be granted where the Commission finds, based on the record before it, that the local action was in fact based on RF concerns; the mere fact that some members of the public expressed concern regarding RF emissions will not be decisive in every case.

IV. State and Local Governments Cannot Request More Information Relating to RF Emissions Than Is Required by the Commission of FCC Licensees

In cases where wireless facilities comply with the FCC's environmental regulations concerning exposure to RF emissions, BellSouth supported the first of two alternative showings the Commission suggested that may be requested by state and local governments.[15] This first alternative is based on the current requirements of FCC licensees with regard to demonstrating compliance with the RF emissions rules. BellSouth argued that due to the fact that the Commission's RF emissions rules were developed based on a full and comprehensive record, compliance with these rules is entirely sufficient.[16] Any further requirements imposed by state or local governments are precluded by the Commission's broad jurisdiction over such matters and would be overly burdensome and unnecessary.[17]

To the extent that a licensee must provide additional information to satisfy state and local government requests, BellSouth agrees with those commenters who stated that the state or local

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15 BellSouth Comments at 5.

16 *Id.* at 4-5.

17 *Accord*, Ameritech Comments at 6, AT&T Comments at 5, GTE Comments at 7, PCIA Comments at 9-11, PrimeCo Comments at 8-10, Sprint Comments at 7-11, US WEST Comments at 5-6.

government should be responsible for paying for any information that is not required by the FCC rules in the normal course.[18]

Certain commenters raised concerns that in cases of collocation, combined RF fields can exceed FCC limits and go undetected.[19] However, Section 1.1307(b)(3) of the Commission's RF emissions rules specifically addresses such situations. In fact, this rule requires that licensees, whose transmitters produce as little as over 5% of the power density limit at an accessible area where the Commission's exposure guidelines are exceeded, share in the responsibility for bringing the site into compliance. Therefore, the Commission's regulatory scheme for RF exposure adequately encompasses multiple transmitter sites and provides specific rule requirements for ensuring compliance.

V. The Commission's Proposed Procedures for Reviewing Requests for Relief Are Reasonable

Like many other commenters, BellSouth supported the Commission's proposals requiring the submission of a request for declaratory ruling that the state or local governmental action is unlawfully based on the effects of RF emissions and is preempted by the Commission.[20] Consistent with positions taken by other commenters who support the Commission's proposed

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[18] *See* PrimeCo Comments at 20, Sprint Comments at 15-16, US WEST Comments at 15-17.

[19] Ad Hoc Association Comments at 5, Laura Arnold (San Juan County) Comments at 1, Parish of Jefferson Comments at 2-3.

[20] BellSouth Comments at 6. *Accord*, GTE Comments at 9, Orange County Comments at 8, PCIA Comments at 12, Southwestern Bell Comments at 7.

procedures, BellSouth also agrees that steps should be taken to complete such proceedings as soon as possible.[21]

VI. Formal Participation in Declaratory Ruling Proceedings Must Be Limited to Only Those Parties Who Would Be Adversely Affected by Grant of the Requested Relief, Necessarily Limiting Such Parties to Only the State or Local Government Involved

Based on the fact that § 332(c)(7)(B)(v) limits those who can seek relief to adversely affected persons, BellSouth argued in its comments that it would follow that formal participation should be limited to only those parties to whom the petition for relief is directed, *i.e.*, the state or local government.[22] Any other persons have had an opportunity to participate in the formation of the challenged governmental action, and it is that state or local government which should be permitted to act on behalf of its constituents in defending their action or modifying their position.

VII. A Rebuttable Presumption of Compliance, Regardless of Whether an Application Is Required to Be Filed for the Proposed Facilities, Is Consistent with the Commission's Broad Jurisdiction in Regulating Exposure to RF Emissions and the Efficacy of the RF Emissions Rules

In its Comments, BellSouth supported the notion of providing licensees with a rebuttable presumption that wireless facilities will comply with the RF emissions guidelines, and to require an interested party to bear the initial burden of proof and make a *prima facie* case for noncompliance.[23] The Commission has broad authority to regulate in this area, and has done so by

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[21] *See* AT&T Comments at 6, GTE Comments at 9-10, PCIA Comments at 12, PrimeCo Comments at 15-16, US WEST Comments at 22-23.

[22] BellSouth Comments at 6-7. *Accord*, AT&T Comments at 7, GTE Comments at 10-11, Southwestern Bell Comments at 10-11; *see* Southwestern Bell Comments at 7-8 ("Private citizens and community groups have ample opportunity to voice their views before local and state governments.").

[23] BellSouth Comments at 7. *Accord*, Ameritech Comments at 9, AT&T Comments at 6-7, GTE Comments at 11, Orange County Comments at 8, PCIA Comments at 13-14, PrimeCo Comments at 19-20, Southwestern Bell Comments at 9-10, US WEST Comments at 17..

promulgating rules upon completion of a comprehensive rulemaking. Compliance with these rules ensures that wireless facilities will not result in exposure levels in excess of the limits established by the federal agency responsible for making such a determination.

Certain commenting parties have suggested that preemption would undermine the FCC's exposure standards because the Commission does not have the resources to enforce its RF emissions rules and licensees may simply not comply.[24] Putting aside the fact that Congress specifically directed the Commission to preempt state and local regulation based on RF emissions when the facilities are in compliance with FCC rules, FCC licensees are obligated under federal law to comply with all applicable regulations, and thus a presumption that they do so with respect to the RF emissions rules is well founded.[25] The FCC's regulatory framework, with the possibilities for forfeiture, license revocation, denial of renewal, *etc.*, acts as a powerful incentive to ensure compliance. If an irresponsible licensee fails to comply, there are remedies available under the Commission's rules to address such a situation.[26] On the other hand, the opposite approach of permitting local authorities to require additional testing and documentation, contrary to § 332(c)(7)(B)(iv), would do much more harm by denying the rapid dissemination of wireless communications services to the public.

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[24] Ad Hoc Association Comments at 3, Cellular Phone Taskforce Comments at 2, CCO Comments at 14-18, NLC Comments at 25-26, Parish of Jefferson County Comments at 3-4.

[25] *See* GTE Comments at 7-8 (non-compliance with FCC rules can subject licensees to forfeiture penalties, suspension or revocation of license, or denial of license renewal), US WEST Comments at 5 (compliance is a condition of obtaining and maintaining a radio license, licensees are otherwise subject to the full enforcement authority of the Commission).

[26] *See* §§ 1.1307(c) (allowing interested parties to submit a petition detailing the reasons for justifying environmental consideration) and (d) (permitting the appropriate FCC Bureau to request an applicant to submit an Environmental Assessment if it determines that a proposal may have a significant environmental effect).

CONCLUSION

BellSouth urges the Commission to adopt rules in accordance with its previously-filed Comments and the Reply Comments above, in order to ensure that proper procedures are developed for reviewing and preempting when appropriate state and local governmental regulation of personal wireless facilities based on the environmental effects of RF emissions.

Respectfully submitted,

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October 24, 1997

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I, Shelia L. Smith, do certify that copies of the foregoing Reply Comments in WT Docket No. 97-192 were mailed this 24th day of October, 1997, via U.S. mail, postage prepaid, first class, to those persons on the attached list.

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